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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1652

FEDERAL ENERGY REGULATORY COMMISSION, *Petitioner,*

v.

SHELL OIL COMPANY, ET AL., *Respondents,*

No. 77-1654

CONSUMER FEDERATION OF AMERICA,
ENERGY POLICY TASK FORCE, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari
To the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT STATE OF LOUISIANA IN OPPOSITION

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BRIEF OF RESPONDENT STATE OF LOUISIANA IN OPPOSITION

Respondent State of Louisiana (Louisiana) submits the following brief in opposition to the petitions for writs of certiorari which have been filed by the Federal Energy Regulatory Commission (Commission) and the Consumer Federation of America, Energy Policy Task Force. These petitions seek review of a Fifth Circuit decision overturning an attempt by the Commission to eliminate the "production or gathering"

exclusion of the Natural Gas Act and to encroach on areas expressly reserved to the states by Congress.

QUESTION PRESENTED

Whether the Natural Gas Act precludes the Commission from regulating the physical activities of production of natural gas by establishing a "prudent operator" standard in certificates of public convenience and necessity authorizing sales of natural gas in interstate commerce.

STATEMENT OF THE CASE

In the interest of brevity, Louisiana will not recount the procedural history of this proceeding, an undertaking which has been performed by Respondents Tenneco Oil Company and Pennzoil Company.

REASONS FOR DENYING THE WRITS

1. The Decision Below is Required by This Court's Established Construction of the Natural Gas Act.

In establishing a regulation requiring a producer to act as a "prudent operator" in developing and maintaining deliverability of gas reserves, the Commission improperly endeavored to thwart the congressional purpose of the Natural Gas Act as interpreted by this Court. Even now it makes no effort to disguise its position: the Commission has "some jurisdiction over the physical acts of the producer and the physical operation of the facilities by which certificated service is rendered." (Commission Pet. at 8-9).

But as the court of appeals properly ruled, if the Commission's assertion were correct, it "would all but eliminate the 'production or gathering' exclusion and would allow the FERC to encroach on areas reserved

to the states." In so ruling, the court of appeals followed the plain language of the Act and the precedent of this Court interpreting the limits of the Commission's jurisdiction. Any other action would have run counter to the strong congressional intent that the role of the states in the regulation of natural gas not be supplanted.

A proper reading of the Act demonstrates that the inclusion of a "prudent operator" standard into certificates is an action beyond the Commission's jurisdiction. Section 1(b) of the Act clearly sets forth the scope of the Commission's jurisdiction, which is limited to:

> . . . the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, . . . 15 U.S.C. § 717(b).

In drafting the Act, Congress took care specifically to withhold jurisdiction from the Commission in certain areas. Thus, section 1(b) of the Act states that the provisions of the Act shall not apply to ". . . the production or gathering of natural gas." 15 U.S.C. § 717(b).

This Court has consistently emphasized that the Act grants *limited* authority to the Commission and that Congress meticulously precluded the Commission from exercising jurisdiction in any but three areas.

> Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in

interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission*, 332 U.S. 507, 516 (1947).

Additionally, in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), this Court said

> Without entering upon another review of its legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies. Accordingly, Congress in § 1(b) of the Act not only prescribed the intended reach of the Commission's power, *but also specified the areas into which this power was not to extend*. 337 U.S. at 503. (emphasis added).

An area recognized as expressly exempted from the Commission's jurisdiction is "the production or gathering of natural gas." Congress intended that the power to regulate production activities would remain vested in the states and that they would continue to regulate these activities.

In passing the Act, Congress took care not to supplant any authority of the states but rather sought to regulate the area which the states could not reach. Thus, in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission, supra,* this Court recognized that:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. 332 U.S. at 517-518.

Further, in *FPC* v. *Panhandle Eastern Pipe Line Co., supra,* this Court stated:

> The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. This probably occurred because the state legislatures had delegated broad and elaborate power to their regulatory bodies over all aspects of producing gas. The Natural Gas Act was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. *Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.* Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as national interests. 337 U.S. at 509-514. (emphasis added).

The Act specifically preserved the rights which the states could exercise and were exercising when the Act was passed. The assertion of Commission jurisdiction over production activities which Louisiana and the other producing states have regulated for years would be inconsistent with the congressional purpose—often cited by this Court—not to invade the powers or prerogatives of the states.

As the court of appeals noted, the Commission points to no case which extends its jurisdiction into the physi-

cal activities of production. Indeed, decisions of this Court have found "production activities" to be entirely separate from sales of gas subject to the Commission's jurisdiction. This distinction was underscored in this Court's first *Phillips* decision, *Phillips Petroleum Company* v. *Wisconsin,* 347 U.S. 672 (1954).

> . . . production and gathering, in the sense that those terms are used in § 1 [illegible]), end before the sales by Phillips occur. 347 U.S. at 678.

Even more specifically, this Court has stated that the production and gathering exemption means that the Commission has ". . . no control over the drilling and spacing of wells and the like." *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 603 (1945). Further, this Court has held that the transfer of undeveloped gas leases is not within the Commission's jurisdiction. *FPC* v. *Panhandle Eastern Pipe Line Co., supra.*

Thus, consistent with the express language of the Act excluding production activities from the Commission's jurisdiction and the clear precedent of this Court, the court of appeals correctly held that granting the Commission jurisdiction to issue Order No. 539-B "would all but eliminate the 'production or gathering' exclusion and would allow the FERC to encroach on areas reserved to the states."

2. The Interpretation of the "Prudent Operator" Standard is a Question For State Courts.

The "prudent operator" standard is incorporated in the rules and regulations of state conservation agencies and has been interpreted by state courts in resolving

questions arising under oil and gas leases.[1] Since the Commission has neither the authority nor the expertise to enforce a standard which is created and defined by state law, the Commission's attempt to enforce the "prudent operator" standard in certificates undermines the dual federal-state regulatory scheme envisioned by Congress.

The interpretation and enforcement of the "prudent operator" standard involves solely questions of state law and must properly be left to the states for decision and action. Otherwise, the potential exists for intolerable conflict between state and federal agencies over the proper interpretation of state law. Such conflicts not only are unnecessary but also are impermissible, since Congress took care to exclude the possibility of any such conflict by specifically precluding Commission regulation of production activities.

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[1] In Order No. 539-B, the Commission stated that:

> The prudent operator standard has long been established as an implied covenant in lease agreements, which means that producers are very familiar with the requirements of this standard. Furthermore, state regulatory agencies, whose principal purpose is conservation of natural resources, require producers to conform with the responsibilities imposed by the prudent operator standard.

See, e.g., Title 30, Louisiana Revised Statutes (1950).

CONCLUSION

Because this Court has settled the question of whether the Commission can negate the production and gathering exclusion of the Act and thereby encroach on areas reserved to the states, a writ of certiorari should not be granted.

Respectfully submitted,

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